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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the district court (Pet. App. 39a-50a) is reported at 260 F. Supp. 7 and the opinion of the court of appeals, vacating petitioner's conviction and remanding the case for further proceedings (Pet. App. 23a-36a) is reported at 368 F.2d 144. The opinion of the district court after remand (Pet. App 17a-20a) is reported at 266 F. Supp. 161 and the opinion of the court of appeals affirming peti-

tioner's conviction after remand (Pet. App. 1a-14a) is reported at 379 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered July 3, 1967. By order of Mr. Justice Fortas, the time for filing a petition for a writ of certiorari was extended to and including September 1, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was an adequate evidentiary basis for the local board's decision that petitioner was not sincere in professing to be a conscientious objector.

2. Whether petitioner was improperly deprived of administrative review of the local board's decision.

3. Whether, at the special hearing conducted for the limited and specific purpose of determining the precise basis for the local board's decision, the district court committed reversible error in hearing only the testimony of the members of the board and not hearing testimony of petitioner concerning the interview conducted by the board prior to its decision refusing to reopen petitioner's classification.

STATUTES AND REGULATIONS INVOLVED

50 U.S.C. App. 456(j) provides in pertinent part:

> Nothing contained in this title * * * shall be constructed to require any person to be subject

> to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * *

50 U.S.C. (1964 ed.) App. 456(j), as it was written prior to July 1, 1967, further provided: [1]

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. * * *

50 U.S.C. App. 460(b) provides in pertinent part:

> The President is authorized—
>
> (1) to prescribe the necessary rules and regulations to carry out the provisions of this title * * * ;
>
> * * * *
>
> (3) * * * The decisions of [a] local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *

Selective Service Regulation 1625.2, 32 C.F.R. 1625.2, provides in pertinent part:

> The local board may reopen and consider anew the classification of a registrant * * * provided

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[1] Effective July 1, 1967, all provisions relating to special administrative review for conscientious objector claimants have been deleted from the statute. See Public Law 90-40; 81 Stat. 100, June 30, 1967.

> * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

STATEMENT

Petitioner, after waiving trial by jury, was tried and convicted in the United States District Court for the Southern District of New York under an indictment charging that he knowingly refused to submit to induction into the Armed Forces of the United States, in violation of 50 App. U.S.C. 462(a). On April 19, 1966, he was sentenced to imprisonment for a period of two years (Pet. App. 51a-52a).

1. In October 1960 petitioner, having reached the age of 18, registered with his local Selective Service board. In November 1961 he was classified by the board as available for military service (1-A) (Tr. 20-23),[2] but the board subsequently granted him a student deferment (2-S) because he was enrolled as a full-time student at St. Francis College in Brooklyn. In November 1964 the board, having learned that petitioner was no longer enrolled at St. Francis College but was taking only a three credit part-time course at another school, classified him as 1-A (Tr. 24; II

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[2] "Tr." refers to the transcript of the trial proceedings. "R." refers to the three-volume record containing the appellant's appendix in the first appeal, the government's appendix in the first appeal, and the transcript of the special hearing.

R. 3a). Later that month, the board ordered petitioner to report for a pre-induction physical examination, and petitioner complied with the order (Tr. 24). In early December 1964 petitioner advised the local board by letter that he was taking the three credit course to fulfill requirements for a B.A. degree which he expected to receive in January 1965, and that he intended to return to school full-time in February to begin work toward an M.A. degree (II R. 4a). In January the board notified petitioner that, upon review of his file, it had determined that the evidence submitted did not justify reconsideration of his 1-A classification, and that, as a result of his physical examination, he had been found acceptable for military service (Def. Ex. D; I R. 52a-53a, 96a). Petitioner wrote to the board in mid-January 1965 that he was in the process of registering in a school of cinematography and wished a hearing to discuss his status as a student (II R. 5a). The board granted the requested hearing on February 2, 1965. At the hearing, petitioner presented evidence that he was enrolled at a school of cinematography and claimed that he intended to re-register at St. Francis College. The board thereupon reclassified petitioner as 2-S and told him to have St. Francis forward proof of his enrollment (Gov. Ex. 4; II R. 18a-19a). In February 1965, the college informed the board that petitioner was "no longer in attendance" (II R. 7a). The board immediately mailed petitioner a request for evidence of his attendance. After six weeks passed without a reply, the board reclassified petitioner as

1-A and mailed him a notification of this classification and of his rights of personal appearance and appeal. No response was received from petitioner (Tr. 32-33).

On April 19, 1965, the board mailed petitioner an order to report for induction on May 5, 1965 (Gov. Ex. 6; Tr. 35). Four days later, on April 23, 1965, the board received a letter from petitioner stating that he was then in attendance at City College as well as the school of cinematography and requesting that his classification as a student be reconsidered and that his induction be postponed at least until the end of the spring term (Gov. Ex. 2; I R. 105a). On that same day, the local board mailed petitioner a request for certifications from the college and the school of cinematography (I R. 29a; II R. 8a), and discussed petitioner's request for a postponement in induction with the New York City Director of the Selective Service System (II R. 9a). The Director thereafter notified petitioner that his induction date would be postponed until July, in order to afford him "an opportunity to continue [his] studies and complete this term," and "recommended that in the future the Local Board be notified, in writing, within ten days after it occurs, of any * * * fact which might change [his] classification" (II R. 9a-11a). On May 10 the board received notice from City College that petitioner was enrolled there, but that he was taking only three credits (I R. 29a).

Two weeks later, on May 24, 1965, petitioner, for the first time, asked the board to send him the spe-

cial questionnaire for conscientious objectors in order that he might apply for such a classification (I R. 30a; II R. 12a). Petitioner's letter stated that he had been concerned with the problem for "the past several years", but that "[o]nce [he] had resolved the problem in [his] own mind, [he] refrained from notifying the board because [he] felt quite secure with [his] status as a student, and [he] thought that [he] would have plenty of time to inform [the board] after completion of school" (II R. 12a). The questionnaire was sent, completed by petitioner, and returned to the local board (Gov. Ex. 2; I R. 31a, 81a, 98a).[3] On June 17, 1965, the board invited petitioner to appear for an interview on July 6, and notified him that the date set for his induction was July 8 (I R. 31a-32a, 40a). On July 1 petitioner informed the board that he wished to change from "no" to "yes" his answer on the conscientious objector questionnaire as to whether he was a member of any religious organization, stating that he was a member of the Catholic Church (Def. Ex. B; I R. 94a). On

[3] In it petitioner stated, after two weeks of deliberating how to answer (I R. 58a), that he was a member of no religious sect or organization and that "as to the possible existence of * * * a 'Supreme Being' " his mind "at this time * * * can only raise questions." He explained, however, that "[b]eyond any possible relation with an above suggested 'Supreme Being' " he had a "feeling of empathy with the human predicament" which predicament he did not want to "maintain and magnify * * * through participation in war." He acknowledged that he had made "no public expression" of these views. (Gov. Ex. 2; I R. 81a, 98a-102a).

July 2, the board received a notice from the principal of Bishop Ford High School in New York City, stating that petitioner had been hired as a full-time English teacher beginning in June 1965 and that it would be "almost impossible at this late date to replace him," and requesting that petitioner be given a one year deferment (Def. Ex. A; I R. 38a-39a, 93a).

On July 6, 1965, the scheduled interview with petitioner was held by the four members of the local board. The minutes of the secretary of the board reflected (Gov. Ex. 9; I R. 34a-35a, 103a-104a):

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. form # 150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would be definitely working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The Board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

On July 8, 1965, petitioner reported to the induction station but refused to submit to induction. He told the officer in charge that he refused "primarily because he was anticipating employment with a high school in Brooklyn" and also because "he was in dis-

agreement with the foreign policy of the United States" and could not reconcile his belief or conscience with that policy. (I R. 41a-43a; II R. 1a-2a).

2. In its opinion finding petitioner guilty of refusing to submit to induction, the trial court pointed out that under 32 C.F.R. 1625.2 the local board was not empowered to reopen and reconsider petitioner's classification after mailing an order to report for induction unless it first specifically found there had been a change in his status resulting from circumstances over which he had no control. The court acknowledged that the development of the beliefs of a conscientious objector could constitute such a change in status, and observed that the board in this case did weigh petitioner's claim. The court noted, however, that the board apparently found that petitioner had not been a "genuine" conscientious objector either before or after the order to report for induction and "[i]n effect * * * found that there was no 'change in status' ". (Pet. App. 45a-48a). The court of appeals, however, found the board's language to be ambiguous. It therefore remanded the case for a hearing to determine whether the board had in fact found that petitioner never was a conscientious objector (or whether, if he was a conscientious objector, his views in this regard had matured before the induction notice was sent) and thus that there was no change in his status, or whether the board had improperly refused to reopen petitioner's classification simply because the claim was not advanced before the mailing of the induction notice (Pet. App. 31a-36a).

3. At the hearing after remand to the district court, three members of the local board [4] were examined and cross-examined extensively—their testimony covers 200 pages of transcript—concerning their conclusion that petitioner was not a "genuine" conscientious objector. All three testified that the purpose of the July interview was to ascertain whether petitioner was, in fact, a conscientious objector at that time, without regard to the fact that his induction order had been issued (III R. 5, 7, 9-10, 22, 39-41, 48, 65-68, 84, 87-88, 91, 148-149, 153-156). The board members stated that they had questioned petitioner at the interview for approximately half an hour (III R. 85, 136), trying to "get him to open up, to find out whether he was really a c.o. or not" (III R. 40-41). Petitioner's main concern at the interview, however, appeared to be the furthering of his education by going to Europe and making films (III R. 29, 32, 46, 75, 84, 88, 137, 149). The board considered, among other things, the fact that when asked about the teaching position he had reportedly accepted at Bishop Ford High School petitioner stated that he had decided not to take the job for personal reasons but declined to disclose what those reasons were (III R. 30-32, 42-43, 136-137, 141-142, 148-149). When asked about his religious affiliations, petitioner stated that he was following no religion, although five days earlier he had written the board that he was a member of the Catholic Church (III R. 54, 169-170). When asked what he would do if his family or girl friend were

[4] The fourth member could no longer recall either petitioner or the interview (III R. 78).

attacked, he informed the board, after some discussion, that he would "fight the attacker off," although six weeks earlier he had stated in the questionnaire that non-violent force would be the only kind he could consider (III R. 101, 104). The board members found petitioner to be "impatient" (III R. 150), "evasive" (III R. 41, 55, 150, 155-157), and "insincere" (III R. 41, 55, 86, 155-157). On the basis of the interview and the information in petitioner's file (III R. 34, 59, 74-75, 118, 139-140, 159, 184), the board decided that there had been no crystallization in petitioner's mind of the views of a conscientious objector, and concluded that "there was no change as to his circumstances" (III R. 37-39). The conviction was reinstated and the original two year sentence was reimposed (see Pet. App. 21a-22a). The court of appeals affirmed (Pet. App. 1a-14a).

ARGUMENT

Based upon the specific direction of the court of appeals, the district court in this case held a detailed hearing to determine the basis upon which the local board refused to reopen petitioner's 1-A classification. Following that hearing, the district court concluded that the board would have honored petitioner's request for reclassification as a conscientious objector, even though that request was made after the issuance of the induction notice, if it had found that the claim had a valid foundation, but that the board had a rational basis to conclude, as it did, that petitioner was "not then, and had never been a genuine

conscientious objector" (Pet. App. 19a). After reviewing the evidence, the court of appeals agreed that this was the basis of the board's decision and that the full record of the proceedings provided "more than ample evidence" for the board's substantive ruling (Pet. App. 11a). In these factual circumstances, there is no warrant for further review by this Court.

1. The evidence clearly demonstrates a rational basis for the board's decision that petitioner was not a conscientious objector—petitioner's requests for student deferments for varying purposes; his failure to express any views of conscientious objection until notified of his pending induction; his vacillations concerning his intent to teach, his religious affiliations, and his views on the use of defensive force; his principal concern at the interview with furthering his education by making films in Europe rather than with being reclassified as a conscientious objector; and his evasive responses to questions posed by the board. Given the board's opportunity to observe petitioner's demeanor, the totality of these factors fully justified the finding that petitioner was not sincere in his professed beliefs. See *United States* v. *Seeger*, 380 U.S. 163, 185; *Witmer* v. *United States*, 348 U.S. 375, 381-383; *Parrott* v. *United States*, 370 F.2d 388, 391-394 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908.

The record does not support petitioner's contention (Pet. 25-27) that the board reached its decision solely on basis of petitioner's acknowledged readiness to use force in the defense of his family. A reading of the

full testimony of the board members clearly demonstrates that petitioner's statements in this regard constituted only one of many factors leading to the conclusion that petitioner was insincere in his professed beliefs. While a willingness to use force in such a situation would admittedly not itself disqualify a registrant from conscientious objector classification, petitioner's statements at the interview, and his differing statement in the questionnaire, certainly were proper matters, among others, for the board's consideration.

2. Petitioner was not improperly denied administrative review of the local board's decision. Then, as now, 50 U.S.C. App. 456(j) provided for the exemption from combatant conscriptive service of persons conscientiously opposed to participation in war, and then, but not now, provided for a special administrative review of a local board's decision not to classify a registrant as a conscientious objector.[5] Selective Service Regulation 1625.2, 32 C.F.R. 1625.2, provides generally for reopening and reconsideration of a registrant's classification upon the presentation of new facts, but directs that after a registrant has been sent a notice of induction, his classification may not be reopened and reconsidered by the local board for any reason, "unless the local board first specifically finds there has been a change in the registrant's status re-

[5] All provisions relating to a special administrative review for conscientious objector claimants have since been deleted from the statute (Public Law 90-40; 81 Stat. 100, June 30, 1967).

sulting from circumstances over which the registrant had no control." Contrary to petitioner's contention, this does not conflict with the provisions of the statute, but provides a rational procedure. Courts of appeals have unanimously found the regulation to be a valid and reasonable means of preventing disruption of the selective service machinery by last minute assertion of pre-existing claims for deferment and have found it not to be in derogation of either the spirit or purpose of the statute exempting conscientious objectors. *Davis* v. *United States*, 374 F.2d 1, 4 (C.A. 5); *United States* v. *Al-Majied Muhammud*, 364 F.2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F.2d 228, 230 (C.A. 6); *United States* v. *Beaver*, 309 F.2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 611 (C.A. 9); *Keene* v. *United States*, 266 F.2d 378, 383-384 (C.A. 10); cf. *Parrott* v. *United States*, 370 F.2d 388, 394 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908. Similarly, the legitimate interest in prompt mobilization need not be thwarted by automatic administrative review of frivolous claims.[6]

This is not a case where no consideration was given to petitioner's post-notice claim. The court below

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[6] In its second opinion following the hearing, the district court concluded as an alternative basis for upholding the order of the local board that if petitioner had any conscientious objection claims, they had in fact matured prior to the issuance of the induction notice (Pet. App. 20a). However, as the court of appeals pointed out, since the local board on ample evidence had determined that petitioner's claim was never genuine "it would be labor in vain to require the Board to determine when the claim matured" (Pet. App. 8a-9a).

held that a post-notice crystallization of conscientious objections to military service could constitute a change in status under the regulation, and consequently that, if such a change in status were found to have occurred, a board could reconsider a registrant's classification. This was the approach taken by the local board in this case. Since, however, the board here found "there was no change as to [petitioner's] circumstances" (III R. 37-39), there was no reason to reopen and reconsider his classification. This preliminary finding was not itself appealable under the special statutory appeal provisions or otherwise. *United States* v. *Beaver*, 309 F.2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 611 (C.A. 9).[7]

Petitioner's argument that upon a registrant's presentation of a non-frivolous claim the board is required to reopen and reconsider his classification and thereby provide him with a right to appeal, is based

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[7] There is no merit to petitioner's related argument that where administrative review is not provided, judicial review should be broader than the traditional "rational basis" rule. 50 U.S.C. App. 460(b)(3) specifically provides that local board decisions shall be final, except where an administrative appeal is authorized and is taken in accordance with such regulations as may be prescribed. Thus where the regulations do not provide for an administrative appeal, as is the case regarding a decision of the nature here involved, Congress has imbued local board decisions with the same finality for extra-administrative purposes as those sustained by an appeal board. See generally, *Estep* v. *United States*, 327 U.S. 114. Moreover, even if broader judicial review standards were applicable there would be no occasion to disapprove the boards' finding on the facts as presented in this case.

upon regulations and cases dealing with the procedure *before* notice of induction is sent (Pet. 19-22). As noted above, after notice of induction is sent, Selective Service Regulation 1625.2, 32 C.F.R. 1625.2 prohibits the board from so acting unless it first specifically finds a change in the registrant's status. In the sole case cited by petitioner involving a claim made after notice of induction, the claim was timely (within ten days of the occurrence) and demonstrated a clear change in status (admittance to a recognized theological school); and the court held only that "[t]he local board should have given consideration to [the registrant's] change of status and determined whether it required his reclassification." *United States* v. *Craig*, 207 F.2d 888, 891 (C.A. 3). Moreover, contrary to petitioner's argument, a mere mailing by a local board of a conscientious objector questionnaire is plainly not a reopening of petitioner's classification, but only a compliance with Selective Service Regulation 1621.11, 32 C.F.R. 1621.11. *United States* v. *Beaver*, 309 F.2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 609-610 (C.A. 9).[8]

3. There is no substance to petitioner's contention that the district court committed reversible error in declining to permit him to testify at the special hearing on remand of the case. At the trial itself, of

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[8] There is no merit to petitioner's further argument that the board rejected his claim because of its lateness (Pet. 8, 10, 25); the court of appeals found the evidence to the contrary "overwhelming" (Pet. App. 7a-8a).

course, petitioner had a right to testify in his own defense, and he did so testify. The special hearing, however, was limited to the purpose of determining the precise basis for the local board's decision—whether it had considered and rejected petitioner's claim to conscientious objector status, or whether it refused even to consider the claim because it was first raised after notice of induction. To make this determination, the district court properly heard the testimony of the board members themselves—the only persons familiar with their deliberations. Petitioner's proposed testimony as to his memory of the interview preceding the deliberations was not pertinent to that limited issue. In any event, the acknowledged purpose of petitioner's counsel in calling petitioner as a witness at the hearing was to permit introduction of a three-page memorandum (Tr. 10-12) which petitioner had prepared as his recollection of the interview (Tr. 55-56, 194-197). Substantial portions of the memorandum had previously been read into the record by counsel in cross-examining the board members (Tr. 51-63, 99-100, 103-107, 110-115, 117, 120, 178-183, 185-186, 188-190), and the memorandum was considered by the court below (Pet. App. 14a) and found to support the government's position rather than petitioner's.[9]

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[9] Petitioner also complains that the government counsel was permitted to ask leading questions at the hearing (Pet. 29-30). The questions, however, were not leading; none suggested answers not within the witness's recollection. In any event, the hearing was not before a jury, and control of the phrasing of questions was a matter for the district court's

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME M. FEIT,
RONALD L. GAINER,
Attorneys.

OCTOBER 1967

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discretion. See 3 Wigmore, *Evidence*, §§ 769, 770, 772 (3rd ed., 1940); 3 Wharton, *Criminal Evidence*, §§ 846, 847 (12th ed., 1955).

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